In the

Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANT,
vs.
JU TOY, APPELLEE.
} No. 535.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLEE AND ON BEHALF OF THE CHINESE SIX COMPANIES.

It appears from the "Certificate," which is the only record before this Court, that the District Court of the United States for the Northern District of California issued the writ of *habeas corpus* on behalf of Ju Toy, named as appellee herein, upon allegations made on his behalf that he is a native and a citizen of the United States unlawfully restrained by an officer of the Steamship Company upon whose vessel said Ju Toy had entered the Port of San Francisco; that he was so detained upon the pretense that he was an alien Chinese not entitled to enter the United States under the Chinese Restriction Acts. It also appears from the certificate that the United States, by the United States Attorney for said Dis-

trict, intervened in the *habeas corpus* proceeding and became the actual respondent; that a return or answer was filed, that a judicial trial was had and that said court found as a fact, upon evidence taken contradictorily with the United States, that said Ju Toy was born in the United States; found as a conclusion of law that he is a citizen of the United States and ordered that he be discharged from detention.

The legal presumption is that this judgment was based upon sufficient legal evidence and that the judgment is valid, assuming that the court had jurisdiction to issue the writ and was not concluded from trying the matter by the previous adverse decision of the immigration officials, as contended by the government.

An appeal was taken by the United States from the decision of the District Court to the Circuit Court of Appeals for the Ninth Circuit and the judges of that court have certified certain questions under the provisions of the act of March 3rd, 1891, and ask instructions of this court. These questions, far-reaching in their scope, are of vital interest to the appellee named in these proceedings, who has been adjudged by one of the courts of the United States to be a native and a citizen; of vital interest to all natives of Chinese descent.

Such persons are citizens of the United States and entitled to all the rights of citizenship. The Chinese Exclusion and Restriction Acts do not apply to

them. *United States vs. Wong Kim Ark,* 169 U. S. 653.

As citizens, they have the right to travel abroad and to return to the United States. If the contention of the government in this behalf is sustained, they must do so at the peril of being excluded and deported by immigration officers appointed to deal with objectionable aliens, and they must be denied the right of appeal to the courts for a judicial determination of the claim of citizenship.

Citizenship is a right of incalculable value. It is a right of which a man cannot be deprived, constitutionally, except by due process of law. In this connection it is the exact equivalent of the right of liberty. Due process of law, in this regard, is judicial process—the right and opportunity to be heard in a judicial tribune of competent jurisdiction. If it be argued in this matter as it was argued by the Attorney General in the case of *Sing Tuck,* 194 U. S. 161, that Congress may establish special tribunals to hear and determine matters and questions of fact arising in the course of their duties and that the decisions of such special tribunals are final and conclusive, we answer, without admitting that such decisions are ever final or withdrawn from ultimate judicial review where questions of private rights arise—aside from this, we answer that Congress has not established any special tribunal with power to pass upon the claim of any person to the right of citizenship.

No Act of Congress can be construed or understood to be a bar to a judicial hearing and determination of the question of citizenship. *Gee Fook Sing vs. United States*, 49 Fed. Rep. 146.

Indeed, the act of August 18th, 1894, under which it is asserted by the government in this proceeding that the immigration officials may finally pass upon the claim of a native Chinese to the right of citizenship, applies in terms to aliens only. The department rules in this behalf, known as the Chinese Regulations, citing as authority the case of *Wong Kim Ark, supra*, declare that they do not apply to Chinese persons born in the United States:

> "If the Chinese person has been born in the United States, neither the Immigration Acts nor the Chinese Exclusion Acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, apply to such persons." Rule 2.

This Court held in the case of *Sing Tuck, supra,* that the immigration officials must determine in the first instance the claim of nativity when preferred by an arriving Chinese and that a writ of *habeas corpus* should not issue until such claim has been passed upon in an orderly manner by the Department of Commerce and Labor.

The government is now seeking to obtain a decision from this court that the determination by the

department as to the claim of nativity is and must be final. But why? Congress has not said that such decision shall be final. The act relied upon applies to aliens only, as already said. There is no rule of law under which it can be contended that such a decision is final. In those instances where it has been decided that special tribunals may be established by Congress to determine questions of fact arising in administrative matters, it has always been held that while the courts will not interfere with such special tribunals by mandamus, if questions of private rights afterwards arise in respect to facts determined by such special tribunals, resort may be had to equity for the ultimate determination of such private rights. See *Johnson vs. Towsley,* 13 Wall. 83.

Due process of law in a matter affecting the right of a man to be free—the claim of the right to be and remain in one's native land and not to be deported therefrom, certainly involves the right of personal liberty—due process of law in this regard implies the right to have that right determined in a judicial proceeding by a constitutional court of justice; implies the right to "a day in court"; to the right to have witnesses for himself and to be confronted by the witnesses against him; implies the right to have the assistance of counsel of his own selection. The proceeding may be never so summary, still, these fundamental rules and rights must be recognized and accorded in order to constitute due process of law in

matters affecting the personal liberty of one claiming to be a citizen of the Republic.

In the *Sing Tuck* case, *supra,* it was suggested that the rules of the Department of Commerce and Labor known as the Chinese Regulations, do not afford a citizen due process of law, and, replying to this suggestion, the court gave a passing glance at such of these rules and regulations as seemed to apply, and commended them as reasonable and fair; without, however, saying that they meet the constitutional requirements as to due process of law. It should be noted, however, that the court had in view the peculiar facts of the case of *Sing Tuck* "and thirty-two others."

We submit that the rules for the summary investigation of the claims of arriving Chinese persons to enter or re-enter the United States do not afford due process of law with respect to the rights of persons who claim to be citizens.

Congress may provide, in the exercise of its exclusive control of the political power, for the summary exclusion of aliens and in this regard aliens have no constitutional or legal rights which entitle them to resort to the courts. Hence, this court has uniformly sustained the act of August 14th, 1894. Congress, however, we repeat, has not attempted to deny, and we assert, could not constitutionally deny, the right of the writ of *habeas corpus* to any class of citizens of the United States.

Citizens of Chinese descent constitute a class of persons—a class of citizens. Can it be contended that Congress has the constitutional power to suspend the writ of *habeas corpus* or to deny the right of the writ to any class of citizens?

Will this court, at the instance of the Department of Justice, construe such a conclusion into the act of Congress and into the Chinese Regulations of the Department of Commerce and Labor?

Habeas corpus is the proper and the only remedy in these cases. *In re Jew Wong Loy,* 91 Fed. Rep. 240. *In re Jung Ah Lung,* 25 Fed. Rep. 141, affirmed 124 U. S. 621.

In this matter the Judges of the Circuit Court of Appeals have certified three questions upon which they desire the instructions of the Supreme Court. We submit that if the court answers the first question in the affirmative and decides that a District Court of the United States should grant a writ of *habeas carpus* to a person of Chinese descent claiming to be a citizen, although his claim of citizenship has been decided adversely to him by the immigration officers and by the Department of Commerce and Labor on appeal, then the other questions become immaterial. In other words, if it be held that a person claiming to be a citizen has a right to the writ of *habeas corpus* for the purpose of having his claim of citizenship determined by the court, it is wholly immaterial

whether or not the immigration officers gave him a proper hearing or abused the discretion vested in them, since their decision cannot be final in any event. In this view, it was not necessary to allege in the petition for the writ that the detained person was denied a proper hearing or that the officers had abused their discretion—these allegations were not necessary since they were not required to be proved.

We submit, however, that if the court, in instructing the Circuit Court of Appeals in answer to the second and third questions, should hold that either of such allegations was necessary, then the court should direct that the appellee be allowed to have his petition for the writ amended accordingly. A person entitled to the writ of *habeas corpus* should not be allowed to suffer through the inadvertence or mistake of the person who has sued out the writ in his behalf. *State vs. Benjamin Scott,* 1 Bailey (S. C.) 294.

This case is not direct authority, but the language of the court affords a most pertinent illustration upon the point just suggested as well as upon other significant phases of this cause. It was a case which arose under an old statute of South Carolina which created a special tribunal composed of Justices of the Peace and freeholders for the trial of slaves and free negroes. The defendant was arrested, brought before one of these special tribunals and charged with being a free person of color and with stealing a negro.

He pleaded that he was white and that the court was without jurisdiction to try him. His plea was disallowed. After many complications the matter came to the Court of Appeals on an application for prohibition. In deciding the matter Judge Johnson of that court said:

> "The question whether the person is entitled to be tried by a jury according to the forms of the common law, or in the summary and in some degree arbitrary manner authorized by the act under which he was arrested, is of itself of little less importance than life and death. It is whether he shall occupy the rank of a free white citizen or one corresponding in this respect with that of a slave; and I cannot consent, where the court possesses any discretion, that a question so important shall be compromitted by the want of a precedent, or inadvertence or surprise, and I am, therefore, of the opinion that the prisoner should yet be afforded an opportunity of testing this question by the rules before laid down."

The undersigned, as the certificate shows, were not the attorneys of Ju Toy, the appellee, in the District Court. They are now, however, attorneys of record in the Circuit Court of Appeals and they appear here in this behalf at the instance of the Chinese Six Companies, who represent a large majority of the resident Chinese in the United States and among them

a great many who have been born in the United States during the past half century.

It is now earnestly submitted on their behalf that the court, in deciding this matter, should consider its bearing upon the rights of the whole class of citizens to which the appellee belongs.

The learned Solicitor General, in his printed motion to advance this cause on the docket, permitted himself to say, outside of the record, of course, that the courts in California are flooded with similar cases, and permitted himself to criticize the court in which similar writs of *habeas corpus* have been sued out since the decision of the case of *Sing Tuck*.

These suggestions of the Solicitor General dehors the record, warrant us in saying here that the whole bar and all the Federal Judges in California hold the learned and upright Judge of the District Court and the Special Referee and Examiner mentioned in the certificate as above criticism in respect to such cases.

It is true, as said by the Solicitor General, that there have been many such cases in the courts at San Francisco since the decision in the case of *Sing Tuck* though the use of the word "flooded" is an extravagance. But it is not correct as intimated by the learned Solicitor General, that there has been any unwarranted interference with the administration of the Chinese Restriction Acts at San Francisco or in the Department of Commerce and Labor. Of the

many writs which have been issued as said by the Solicitor General, many have been discharged and the applicants remanded for deportation; many others for whom writs have been obtained have been enlarged after the most painstaking judicial inquiry. Some mistakes have, no doubt, been made, but the records of such cases show beyond all reasonable doubt that many natives of the United States have been refused landing by the immigration officers and the department.

This is, perhaps, inevitable. The hearing under the "Chinese Regulations" is a star chamber proceeding, wholly devoid of the sanctions of a judicial examination. The person whose right to return home is at stake if he be a native, is denied the benefit of counsel and in the very nature of things, and, aside from race hatred and prejudice which too often intervenes, many mistakes are made and many cases of grievous injustice occur.

We are now contending for the right of persons so wronged to have judicial redress by due process of law in a court of justice.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

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No. 535.

THE UNITED STATES

vs.

JU TOY.

SUPPLEMENTAL BRIEF FOR APPELLEE.

The case is fully stated in the appellee's original brief and in the brief filed on behalf of the Government.

The issue presented is based entirely upon the construction and constitutionality of the act of Congress of August 18, 1894.

The question of the interpretation and validity of that act has been recently before this court in the case of *Sing Tuck vs. U. S.* (194 U. S., 161).

In that case the facts were identical with these with the one exception that there the writ of *habeas corpus* was sued out before the appeal to the Secretary of Commerce and Labor; here the writ is sued out after the appeal. In both cases the decision of the executive officer was against the alleged citizen; in both cases the decision of the judicial tribunal was in his favor.

In the *Sing Tuck* case the contention of the appellee was twofold: First, that the act under consideration by its terms

only applied to aliens, and not to those claiming to be citizens; second, that if it could be construed to apply to the latter class of persons such part as applied to those claiming citizenship was unconstitutional because it would deprive a citizen of his liberty without due process of law.

The majority opinion holds that for the purpose of determining the question of the fact of citizenship in the first instance the act applies to those claiming to be citizens as well as to those admittedly aliens, and that it is not a deprivation of due process of law to compel a Chinese person claiming to be a citizen to be subjected to this "sifting process" delegated to executive officers before allowing him to test the fact of his citizenship upon *habeas corpus*. But the court in that case expressly refrains from determining the question whether or not such alleged citizen would have such right after an adverse decision of the Secretary of Commerce and Labor upon appeal.

The only question therefore presented in the present case is the one question left undisposed of in the Sing Tuck case, and it practically resolves itself into this: Is the act of 1894, making the decision of the Secretary of Commerce and Labor final upon the question of citizenship, after its determination by them on appeal adversely to the claimant, constitutional?

It is claimed by the appellee that it is not, in that if it were it would deprive him of his liberty without due process of law, as guaranteed by the fifth amendment to the Federal Constitution.

ARGUMENT.

Comment should first be made upon certain arguments outlined by the Government in its brief and urged at the hearing before the court. It is first contended that to allow proceedings upon *habeas corpus*, after a decision by the Secretary of Commerce and Labor adverse to the applicant, would

"render the original investigation valueless, make it indeed an idle waste of time and energy;" and also that it would "nullify the requirement that the applicant must in some reasonable way demonstrate to the inspection officer right of entry and require that officer in many, if not all cases, to act upon one state of facts—perhaps a mere perfunctory showing—and then to have the court to pass upon an entirely different one."

As we read the *Sing Tuck* case, its conclusions, which are entirely reasonable, would in no manner be nullified by a decision in this case favorable to the appellee. The Sing Tuck case only requires resort in the first instance to what it terms a "*sifting process*." Those who have been "sifted" through have no further controversy with the Government; whether the others can proceed further it does not say. Of twenty-five Chinamen claiming to be American citizens and seeking admission into this country, it is safe to say that if they all had their election of proving their claims before the district judge according to common-law rules of evidence and subject to the privilege of the sixth amendment defining due process of law, or before an arbitrary inspector where, under the rules, almost every privilege is denied them and where the proceeding is governed by no rules for the admission or exclusion of evidence, it is safe to say, we argue, that the whole twenty-five would resort to *habeas corpus* in the district court; but under the rulings in the Sing Tuck case their claims must be first passed upon by the inspector and then by the Secretary. Now, out of the twenty-five, fifteen would probably be admitted by the inspector, and on appeal by the remaining ten there would probably be a reversal in five cases. So the Sing Tuck decision, instead of rendering the proceedings before the inspector and before the Secretary valueless, has had the effect of decreasing the number of *habeas corpus* cases in the district court from twenty-five to five—a consummation of immense value in the orderly administration of justice.

It is, too, claimed that the case passed upon by the inspector might, and in many cases *is*, an entirely different one from that subsequently to be passed upon by the district judge. In answer to this, it is earnestly urged that if it were not, the applicant would have no cause of complaint. If the proceedings before the inspector could be made identical with those before the district judge the applicant would get his due process of law in the first instance, and he would be content to be concluded by the inspector's findings properly reviewed. But it is the very foundation of the applicant's complaint that he *cannot*, under the rules laid down by the Immigration Bureau governing the proceedings before the inspector, present the case that he subsequently presented in the district court, when he is granted the privileges embodied in the sixth amendment to the Federal Constitution, or, in other words, when he is not deprived of due process of law. There is nothing more salutary than the rule that where an issue of fact has been determined by a proper tribunal it cannot be re-examined collaterally; but the rule has its foundation in the fact that the first trial was in a proper tribunal.

In the argument at bar the Attorney General in elaborating upon this point instanced the following case: A trial for murder. The fact in issue is the commission of the murder. There is a verdict of conviction. Can the facts upon which that conviction is based be re-examined and passed upon in *habeas corpus* proceedings? The answer, we confidently submit is not that they could not merely because there had been a former trial, but because there had been a former *constitutional trial*, such as is guaranteed by the fifth amendment to the Constitution. But if the detective delegated to apprehend the murderer should, after consideration of the evidence before him, pronounce the prisoner guilty his findings would not be taken as conclusive. There is a United States statute that excludes convicted felons from admission into the country. Could Congress delegate to an inspector

authority to pass finally upon such evidence as he might gather as to whether or not an applicant is a convicted felon? Congress could also probably exclude criminals, but it would not make the conclusion of a non-judicial inspector final on the question of guilt or innocence.

It has been argued, too, that the fact upon which a court bases its jurisdiction having been tried by the court and found in favor of the *jurisdiction* cannot be attacked collaterally; but there again the fact in issue has been given a judicial determination.

But it is argued the case before the inspector might be entirely different from that presented to the court. It would be a curious thing indeed if the trial in the district court where the accused is given compulsory process to compel the attendance of witnesses, where he is allowed counsel who can develop on cross-examination facts that otherwise would never be known, and where the admission and exclusion of evidence are regulated by the common-law rules of evidence—it would be curious, we say, if the case so presented resembled in any degree the case made out before the inspector, where there is no compulsory process, where no counsel is allowed the accused to cross-examine the witnesses against him, and where testimony is received and excluded by a subordinate executive officer of the Government who is probably not acquainted with so much as the title to the most elementary work on the law of evidence. On appeal to the Secretary, an executive officer again passes upon the same evidence thus produced before the inspector. We will impute the honestest motives to all the inspectors, but who can but condemn a system that will permit an American citizen to deportation upon hearsay testimony that he is an alien.

Another argument at bar on behalf of the Government was that *habeas corpus* should not be resorted to unless there be an allegation of some abuse of discretion by the inspector or some unwarranted action in receiving and excluding evidence. Is not the fact that it is discretion entirely and

not the common-law rules of evidence that governs his admission and exclusion of testimony sufficient to entitle the applicant to a proper and constitutional trial in the district court? The Attorney General distinguishes *Gonzales vs. Williams*, 192 U. S., 1, from cases similar to the present, by saying that in that case the facts were conceded and an issue of law only was presented which could not be passed upon by the executive officer, and for that reason the courts assumed jurisdiction. If the executive officers in that case could not pass upon the law involved, how in these cases can they pass upon the law respecting the admission or rejection of evidence which must be settled by them before testimony can be received to establish the issue of facts? The one case would leave as much law to be passed upon by a layman as the other.

It is believed that no better illustration of the pernicious consequences of leaving to the final determination of the executive officer the question of citizenship can be had than is presented in the present case. The appellee, Ju Toy, is admittedly an American citizen. He has established his status before a properly constituted judicial tribunal. The Government is appealing, not because it contends that Ju Toy has not properly proved that he is an American citizen, but because it complains that he should not have been given the privilege of proving it by recognized methods of proof. Its contention in brief is that this man, legally and lawfully adjudged to be an American citizen by the law of the land—the law by which even a pickpocket is entitled to be tried (*Callan vs. Wilson*, 127 U. S., 540)—should be retaken into custody, deprived of his liberty, and exiled for life from his native land, from his friends, from his business and property, merely because some subordinate immigration inspector, who has achieved his position as the result of some catch-question examination, with no knowledge of the fundamental principles of law or evidence, acting upon the necessarily limited evidence before him, entertains a doubt which the

Government is made entitled to, upon the fact of citizenship. Can there be any doubt but that a great proportion of the itinerant population of the country, admittedly Anglo-Saxon citizens, if called upon to prove the fact of their citizenship under such conditions would fail?

THE AUTHORITIES.

1. The question whether or not the hearing before the inspector amounts to due process of law as to those claiming citizenship has, of course, not been disposed of by this court. It was merely postponed in the *Sing Tuck* case.

Whenever the question has been raised, however, in the lower Federal courts the decisions have all held that such proceeding does not amount to due process of law (*Gee Fook Sing vs. U. S.*, 49 Fed. Rep., 146). Before the ruling of this court in the Sing Tuck case the lower courts had all held that the writ could issue before the hearing before the inspector and the appeal therefrom. Since that decision all the courts have held that the writ will lie after the appeal, and that to deny it would be a denial of the due process of law guaranteed by the fifth amendment. Every adjudicated case upon the point, therefore, holds with the appellee.

2. With reference to the cases cited by the Attorney General on his brief:

In *Lem Moon Sing vs. U. S.*, 158 U. S., 538, the applicant was concededly an alien, and this court there only held that with respect to an alien the decision of the Secretary of Commerce and Labor on appeal is conclusive.

In *Chin Bak Kan vs. U. S.*, 186 U. S., 193, the proceeding to deport was under the act of 1888, which concludes:

"But any such Chinese person convicted before a commissioner of the United States court, may within ten days from such conviction appeal to the judge of the district court for the district."

Here it will be seen the trial provided by the Constitution is expressly given him by the statute, and so this court says in its opinion in that case (page 200):

"A United States commissioner is a quasi-judicial officer and in these hearings he acts judicially. Moreover, this case was taken by appeal from the commissioner to the judge of the district court and his decision was affirmed so there was an adjudication by a United States judge in the constitutional sense as well as by the commissioner acting as a judge in the sense of the statute."

In the *Japanese Immigrant* case, 189 U. S., 86, the applicant was admittedly an alien, and the reason for the ruling in that case can certainly not be considered to apply to one who claims to be a citizen.

In *Murray's Lessee vs. Hoboken Land Company*, 18 Howard, 272, the question involved was one of due process of law with respect to deprivation of property. The owner of the property was a United States collector of customs, who was short in his accounts. A distress warrant was issued and levied upon the land, which was sold thereunder June 10. The preceding April the same property had been sold under an execution at the instance of a private creditor. In discussing the proceeding under the distress warrant the court says:

"But is it due process of law? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see

whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on them after the settlement of this country."

It then proceeds to point out that there had always been a proceeding in England analogous to a distress warrant by which the property of a government official short in his accounts with the Crown could be summarily confiscated, and therefore concludes that a similar process authorized by statute in this country is the due process of law contemplated by the Federal Constitution.

This court has also held that proceedings to enforce the collection of taxes by summary process against the land taxed are not determinable by the same rules with respect to due process of law as cases involving deprivation of life or liberty. In Hagar *vs.* Reclamation District, 11 U. S., 701, it is said:

"The appellant contends that this fundamental principle was violated in the assessment of his property, insomuch as it was made without notice to him, or without his being afforded any opportunity to be heard respecting it, the law authorizing it containing no provision for such notice or hearing, his contention being that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty or property.

"*Undoubtedly* when life and liberty are involved 'due process' requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard.

"So also when title or possession of property is involved. But when the taking of property is in the enforcement of a tax the proceeding is necessarily less formal."

COLLATERAL ATTACK.

It is submitted that when the right to due process of law depends upon the existence of a fact the party claiming the right is entitled to have that fact tried according to the law of the land. Were this not so it can be readily seen that in permitting the fact to be tried by arbitrary rules this constitutional guarantee can be greatly abridged, if not entirely destroyed.

In *Ex parte* Milligan, 4 Wall., 1, the facts were these: Milligan was tried before a military commission on charge of being in open rebellion against the United States Government. He was convicted and sentenced. He then applied to the court for a writ of *habeas corpus*, alleging that the military court had no authority to try him.

The court, in the *habeas corpus* proceeding, inquired into the question of fact upon which depended the right of the petitioner to be tried by a civil or a military court, and, finding that he was entitled to be tried by a civil court, discharged him. In speaking of the trial before the military commission the court says (p. 201):

"Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? And if so, what are they?

"Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it 'in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish,' and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is 'no unwritten criminal code to which resort can be had as a source of jurisdiction.'"

To the same effect is the case of State *vs.* Scott, 1 Bailey (S. C.), 294, cited at page 8 of the Appellee's Original Brief.

The doctrine of collateral attack and retrial of issues of fact imply a trial by some judicial tribunal in the first instance. It can certainly not apply to the mere opinion of an immigration inspector, whose function is nothing more than that of a detective appointed to apprehend a suspect.

Respectfully submitted.

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